Office Supreme Court U.S.
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MAY 17 1900
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Filed May 17, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 525.

THOMAS F. FARRELL ET AL., PLAINTIFFS IN ERROR,

vs.

WEST CHICAGO PARK COMMISSIONERS.

SUGGESTIONS ON BEHALF OF THE DEFENDANT IN ERROR IN RESPONSE TO MOTION MADE BY PLAINTIFFS IN ERROR FOR RULE TO SHOW CAUSE WHY DEFENDANT IN ERROR SHOULD NOT BE PUNISHED FOR CONTEMPT.

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Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5-16-1900

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 525.

THOMAS F. FARRELL ET AL., PLAINTIFFS IN ERROR,

vs.

WEST CHICAGO PARK COMMISSIONERS, DEFENDANT IN ERROR.

Motion Made by Plaintiffs in Error for Rule to Show Cause why Defendant in Error Should not be Punished for Contempt.

Suggestions on Behalf of Defendant in Error.

STATEMENT.

This is a motion made on behalf of plaintiffs in error for a rule to be entered in the above-entitled cause requiring The West Chicago Park Commissioners, defendant in error, to show cause why it should not be punished for a contempt

of this court. The motion filed on behalf of the plaintiffs in error is in the following language:

"Now on this day come the above-named plaintiffs in error by George W. Wilbur and Newton A. Partridge, their counsel, and move the court that a rule be entered herein, that said defendants in error and each of them show cause why they should not be punished for contempt in violating the orders of said court and the statutes of the United States in attempting to collect the special assessment involved in said proceedings" (page 1 of printed motion of plaintiffs in error).

The West Chicago Park Commissioners is a quasi-municipal corporation and a public body politic incorporated under the statute of the State of Illinois approved and in force February 27, 1869 (sec. 3, Private Laws of Ill. 1869, vol. 1, p. 343).

Wilcox *et al. vs.* People *ex rel.*, 90 Ill., 186.

And the legal designation of the defendant in error in the above-entitled cause is "West Chicago Park Commissioners" (Private Laws of Ill. 1869, p. 342, sec. 2).

The same act authorized a board of park commissioners, seven in number, to be appointed by the governor of the State of Illinois and confirmed by the senate. The seven members so appointed by virtue of the provisions of said act manage and direct the business and affairs of said "West Chicago Park Commissioners," a quasi-municipal corporation. Under the act above cited and supplemental acts of the Illinois legislature the "West Chicago Park Commissioners" commenced in 1896 proceedings for the levy and collection of a special assessment, pursuant to the provisions

of the laws of Illinois in that behalf, to pay the cost of the improvement of Douglas boulevard from Garfield park to Douglas park, in the city of Chicago, county of Cook and State of Illinois. These proceedings were commenced in the county court of Cook county, and in due time the proceedings so begun were held to be valid, and the order of confirmation by the county court of Cook county was, on October 13, 1899, affirmed by the supreme court of Illinois, and a final judgment order to that effect was entered on the 13th of October, 1899, in said supreme court. From that final judgment of the supreme court of Illinois the plaintiffs in error in the above-entitled cause sued out, on the 23d day of January, 1900, the writ of error now pending in this court in this cause. It is manifest from a casual reading of the motion now under consideration that the counsel for plaintiffs in error had in their minds, when they framed such motion, that "West Chicago Park Commissioners" was not an individual corporate entity, but that the legal designation of such corporate entity—"West Chicago Park Commissioners"—included the individual members of the Board of West Chicago Park Commissioners. However this may be, no complaint is made that any natural person or any members of the Board of West Chicago Park Commissioners, or any officer or employé of the West Chicago Park Commissioners, has violated any rule or order of this court in any respect whatever.

It will not appear from the petition filed in this cause in support of the motion for the rule to show cause that any complaint is made against, or any act charged as having been committed by, any member, officer, or employé of "West Chicago Park Commissioners" which can in any

way be the basis of proceedings for contempt against them as such officers or employees. In the petition counsel for plaintiffs in error say:

"Subsequent to the service of said citation said defendants in error returned the real estate of your petitioner and his coplaintiffs in error, as delinquent, to the county treasurer and *ex officio* collector of the county of Cook, etc."

Inasmuch as there is but one defendant in error in the present proceeding, the language above quoted from the petition of the plaintiffs in error must be construed to mean the municipal corporation known and designated as "West Chicago Park Commissioners," and cannot be construed as a charge or complaint made against any member or members of the board of "West Chicago Park Commissioners" or as against any officer or employee of "West Chicago Park Commissioners." Manifestly, a municipal or quasi-municipal corporation cannot be the subject of punishment as for a contempt in any court. In order to inflict upon any individual or natural person punishment as for a contempt of court, the individual charged as being guilty must be brought before the court in his own proper person, and by proper proceedings.

The several affidavits filed in support of the motion are alike deficient in affirming that any individual member, or that any officer or employee of "West Chicago Park Commissioners," the defendant in error herein, have been guilty of any act, step, or proceeding which can be made the subject of punishment for contempt.

The claim is made, however, that the "West Chicago Park Commissioners," manifestly meaning the quasi-mu-

nicipal corporation known as such under the laws of Illinois, has made a return of the real estate owned by the several plaintiffs in error to the county treasurer and *ex officio* collector of Cook county, Illinois, showing to the latter officer that the lots and lands of the plaintiffs in error are delinquent as not having paid the amount of the special assessment, levied as aforesaid against the lots and lands of plaintiffs in error respectively to pay the cost of the improvement of said Douglas boulevard. No part of any such return, if any was ever made by "West Chicago Park Commissioners" or by any officer or employee of said park commissioners, is before the court, and your honors are asked to infer from meager and very general affirmations found in the petition and affidavits in support thereof that some return of lots and lands of plaintiffs in error has been made to the county collector of Cook county, which is a violation of a restraining order or supersedeas and which counsel for plaintiffs in error claim necessarily resulted and became effective on the 23d day of January, 1900, when the writ of error was sued out from this court from the final judgment of the supreme court of the State of Illinois, entered therein on October 13, 1889. (See Farrell *vs.* West Chicago Park Commissioners, 182 Ill., 250, and also Record in this cause, pp. 251, 252.)

It is not deemed necessary to notice seriously the fact that some time subsequent to the date of entry of the final judgment on October 13, 1899, in the supreme court of Illinois, to correct which the writ of error now pending in this court was sued out, a petition for rehearing was filed by plaintiffs in error in said supreme court of Illinois and subsequently denied by the latter tribunal. No judgment

of any kind was entered in the supreme court of Illinois on December 11, 1899, and the formal order denying the petition for rehearing, which had been filed by the plaintiffs in error, left the final judgment of the supreme court of Illinois in full force and effect as of the 13th day of October, 1899. Counsel are manifestly in error in stating, as they do in their abstract of the record filed in support of the present motion, that the judgment of the supreme court of Illinois was on October 30, 1899, and that the opinion of the supreme court of Illinois was also filed October 30, 1899 (Abstract, p. 3). Both the final judgment of the supreme court of Illinois and the opinion of that court were filed on October *13*, 1899 (Farrell *vs.* West Chicago Park Commissioners, 182 Ill., 250; Record, pp. 251, 252). Counsel have doubtless confused in their minds the *30th* day of October with the *13th* day of October, 1899.

The time within which the plaintiffs in error had the right to sue out a writ of error and have the same operate as a stay order or supersedeas began to run on the 13th day of October, 1899. Forty days of that time had run against the right of the plaintiffs in error to sue out their writ and have it made a supersedeas on the 22d day of November, when the stay order was granted by the chief justice of the supreme court of Illinois directing a stay of proceedings until the petition for rehearing filed in the latter court should have been determined. The petition for rehearing was denied on December 11, 1899, and from December 11 to January 23, 1900, 44 days had elapsed; so taking out the number of days which it may be insisted should be excluded from the time within which the plaintiffs in error had the right to sue out their writ, *84 days* had elapsed

within which no order of any court whatever or of any kind or character prevented the plaintiffs in error from pursuing their right to sue out the writ of error now pending in this cause. The writ should have been sued out within 60 days, exclusive of Sundays, from the date of the rendition of the final judgment sought to be reviewed in order to have the writ operate as a supersedeas or stay order restraining the defendant in error from taking such steps as the law authorizes for collecting the special assessment aforesaid. It will thus be seen that the plaintiffs in error lost the right to have the writ of error operate as a supersedeas by failing to sue out the writ within the time allowed by law. This loss was the result of their own laches and was not the fault of any court or judge.

I.

Suggestions on Behalf of Defendant in Error Why the Motion of the Plaintiffs in Error Should be Denied.

"The service of a writ of error or the perfection of an appeal within 60 days, Sundays exclusive, after the rendition of the judgment or the passing of the decree complained of, is an indispensable prerequisite to a supersedeas and it is not within the power of a justice or judge of the appellate court to grant a stay of process on the judgment or decree if this has not been done" (Kitchen *vs.* Randolph, 3 Otto, 86).

This doctrine is affirmed in Pugh *vs.* Davis, 110 U. S., 227. To the same effect is Sage *et al. vs.* The Central Railroad Co. of Iowa, 412, where this court say: "A supersedeas

is a statutory remedy. It is only obtained upon a strict compliance with all the required conditions, none of which can be dispensed with." Hogan *vs.* Ross, 11 Howard, 297; R. R. Co. *vs.* Harris, 7 Wall., 575.

"Time is an essential element in the proceeding and one which neither the court nor the judge can disregard. If a delay beyond the limited time occurs the right to the remedy is gone and the successful party holds his judgment or decree free and discharged from this means of staying proceedings for its collection or enforcement. This is a right which he has acquired and of which he cannot be deprived without due process of law. The court can no more give effect to a supersedeas by ordering that the appeal shall relate back to the time within the sixty days, than it can to an appeal begun after the expiration of two years by dating it back to a time within the limitation. To make a *nunc pro tunc* order effectual for such purposes, it must appear that the delay was the act of the court and not of the parties, and that injustice will not be done" (Sage *vs.* Central R. R. Co., 3 Otto, 412).

It would seem to be manifest that no other argument or suggestion is necessary to show conclusively that the right of the plaintiffs in error to sue out the writ in the above-entitled cause, and have the same made to operate as a supersedeas, expired long before January 23, 1900, when it was in fact sued out, and the following day lodged in the office of the clerk of the supreme court of Illinois, where the record is kept.

II.

The record fails to show when the bond required to be filed by the plaintiffs in error was in fact, if ever, filed. There is what purports to be a bond contained in the transcript of the record certified by the clerk of the supreme court of Illinois, and there appears also in the transcript an affidavit of George W. Wilbur, sworn to on January 27, 1900, with an order entered thereupon by the chief justice of the supreme court of Illinois on January 29, 1900, allowing one *Michael Hennigan* to insert his name in and to sign the bond as a principal, which was accordingly, as the record shows, done.

In other words, some of the plaintiffs in error, it may be presumed, had signed, sealed, executed, and filed a bond some time between January 23 and January 27, 1900; that after such bond had been duly executed and filed with the clerk of the supreme court of Illinois, counsel for plaintiffs in error wished to add another property-owner, whose property had been assessed for the cost of said improvement, to the already large number of plaintiffs in error in this cause, and accordingly, without the consent of the principals or the surety upon the bond, which had already been executed and filed, the name of Michael Hennigan was inserted in the body of the bond and his name signed thereto as one of the principals of said bond. This action rendered the bond, a copy of which is contained in the transcript of the record in this cause, absolutely invalid.

In Newlan *vs.* Harrington, 24 Ill., 207, Judge Breese, in writing the opinion of the court, says:

"It is a familiar rule that a guarantor is not liable beyond the express terms of his undertaking, * * * and it is not good policy to permit a party interested in such papers to alter them."

Newlan *vs.* Harrington, 24 Ill., 207.

By the insertion of Hennigan's name in the so-called bond filed by plaintiffs in error in this cause, the liability of the surety was increased without the surety's consent, and thereby the whole bond was rendered nugatory. A recovery by defendant in error upon said bond would be denied.

Chilton *vs.* People, 66 Ill., 507.

The bond in proceedings like the present now before the court is an essential adjunct to a writ of error if it is proposed to make the writ a supersedeas, even if such writ be sued out within the time allowed by law. The order of the chief justice of the supreme court of Illinois allowing the bond to be amended after it had been duly executed and filed could in no way prevent the insertion of the name of Michael Hennigan in the body of the said bond from making it wholly invalid.

The counsel for plaintiffs in error, in their brief filed in support of their motion, say:

"The practice seems to be so well established and the statutes covering such cases are so plain that citation of authorities would possibly be out of place."

(This view of counsel for plaintiffs in error seems to be verified by their citation of Booth *vs.* Tiernan, 109 U. S., 205.)

It will be evident to your honors that Booth *vs.* Tiernan,

supra, is wholly "out of place" as an authority to support the motion of the plaintiffs in error.

It is perfectly clear to your honors that the present motion should be denied, first, because the writ of error was not sued out in apt time; and, second, because no valid bond has been given by the plaintiffs in error to indemnify the defendant in error either for costs or damages.

Respectfully submitted.

FRANCIS A. RIDDLE,
Counsel for Defendant in Error.